No. 57.

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v.
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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

JAS. E. BOYD,
*Assistant Attorney-General.*

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### STATEMENT OF FACTS.

Morris Keim, the appellant, commenced this action in the Court of Claims by a petition on the 25th of July, 1895. He filed amended petitions by leave of court on the 7th of October, 1895, on the 22d of December, 1895, and on the 8th of January, 1898. The second and third amended petitions are set forth in the record, one on pages 1, 2, and 3, and the other on pages 13, 14, and 15. His last demand for judgment was for $3,452.30.

The facts set out in the several petitions are substantially the same: That Keim, who is a citizen of the

United States and of the State of Virginia, was duly certified after an examination by the Civil Service Commission and was, on the 7th of May, 1888, appointed to a clerkship in the Post-Office Department of the United States at a salary of $900 per annum. He was thereafter, upon his own request, transferred from the Post-Office Department to the Treasury Department, and, later on, from the Treasury Department to the Interior Department, in which last-named Department he was at first appointed to a clerkship at a salary of $1,200 a year, and assigned to duty in the Pension Bureau. Subsequently his salary was reduced to $1,000 per annum and he was holding a clerkship in the Interior Department, and was on duty in the Pension Bureau, at $1,000 a year on the 31st of July, 1894, when he was discharged from the service by order of the Secretary of the Interior. The action of the Secretary appears to have been based upon the following indorsement on the order of discharge (record, p. 5):

> The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him.
>
> WM. LOCHREN,
> *Commissioner.*
>
> JULY 14, 1894.

Keim was a soldier in the Army of the United States during the civil war and was honorably discharged therefrom April 17, 1865.

It is further found as a fact that at the time of Keim's discharge from the clerkship, the Secretary of the Interior, upon the recommendation of the Commissioner of

Pensions, retained, and continued to retain at the time of the trial of this case in the court below, other clerks of the same division, who received after Keim's discharge, and continued to receive, a salary of $1,000 per annum, and that said clerks were persons who had not served in the military or naval service of the United States and had, therefore, not been honorably discharged therefrom. The court further states in substance that the clerks retained are not shown to the court, except as set forth in the findings, to have possessed at the time of Keim's discharge better or inferior capacity for the proper discharge of the duties of their said offices than were the qualifications of Keim for the discharge of the duties at that time; and further, that on or about the day that Keim received notice of his discharge additional clerks were appointed to duties in the same division in which he served in the said Bureau who had never rendered any military or naval service. It did not appear, says the court, that any of these clerks were regarded or reported as inefficient by any superior officer, and it does not appear that those so retained, or those thereafter appointed, possessed better, or equal, or inferior qualifications for the discharge of the duties of their respective offices than those possessed therefor by Keim (findings of fact by the court, Record, pp. 4 and 5). The amount demanded by Keim, to wit, the sum of $3,452.30, is the salary which he would have received if he had remained in the service from the time of his dismissal to the filing of his last amended petition. He alleges in his petition that he was at all times ready and willing

to perform the duties of the clerkship from which he had been dismissed and was prevented from so doing by the action of the Secretary of the Interior, in discharging him from the service. The court in its finding of facts (Record, p. 5) says that there is no evidence that Keim made any effort to secure other employment or that he has, or has not, been employed at any other kind of work from and after his discharge. Keim requested additional findings of fact, which the court refused (Record, pp. 6 and 7). The court, in an opinion which will be found in the record (pp. 7, 8, 9, and 10), dismissed the petition and Keim appealed.

## ARGUMENT.

The principal question involved in this case is as to whether the courts have the right to review the action of the head of an Executive Department in discharging a clerk from such Department.

Keim, who was appointed under the civil-service régime to the position which he held, now insists that, by virtue of section 1754, Revised Statutes, and other provisions of law, cited in his brief and hereafter referred to, his discharge from the service was illegal, and that the courts have the right to review the action of the Secretary of the Interior in discharging him.

So far as section 1754 is concerned, I can not see that it has any bearing upon this case. That section is as follows:

> Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty,

> shall be preferred for appointment to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices.

As will be seen, it relates altogether to appointments to civil offices and makes no reference whatever to discharges.

Keim is an honorably discharged soldier, and if his discharge from the Army was by reason of disability resulting from wounds or sickness incurred in the line of duty, under section 1754 he would have the preference in appointment to civil office, provided he possessed qualifications equal to those of others seeking the same position, and having been appointed to a position in the civil service of the Government it is to be presumed that he had the benefit of all the legal rights and preferences to which he was entitled by the foregoing statute or any other.

But, as before suggested, the question of appointment is not for consideration in this case. There is no complaint as to the manner of appointment or as to the position to which Keim was assigned. The question in this case is solely as to whether, after Keim had been appointed to a clerkship in the Interior Department, the Secretary of the Interior had the power to remove him, and if, after the Secretary had exercised such power, the courts have a right to inquire into and pass upon the validity of his action.

In the brief filed by appellant it is claimed that there is another statute which protected him, namely, section 3

of the act of August 15, 1876 (Supp. R. S., Vol. I, 120), which reads as follows:

> That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service:
>
> *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors. * * *

It is the proviso in this section upon which appellant relies. He insists that, because he has been honorably discharged from the military service of the United States, in making any reduction of the force in the Interior Department, in which he was a clerk, the head of the Department should have retained him in preference to those who had not been in the military or naval service of the United States.

Unfortunately for appellant, this statute has no application, for the reason that, upon the facts as they appear, his discharge was not the result of a reduction of force in the Interior Department, but he was dismissed from the service upon the ground that his rating was inefficient. In other words, when the record he had made was examined and his punctuality, attendance, industry, conduct, and ability were passed upon it was found that

his rating as a clerk in the Department was inefficient, and he was thereupon discharged from the service.

Appellant then claims protection under the civil-service act of 1883 (22 Stats., 403, Supp. R. S., Vol. I, 395, section 7):

> That after the expiration of six months from the passage of this act no officer or clerk shall be appointed and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith.
>
> But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes of the United States, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said Statutes.

But it will be observed that the second paragraph of that section simply preserves the preference in appointment to which persons discharged from the military and naval service were entitled under section 1754, Revised Statutes, before referred to.

We find ourselves, therefore, coming back to the single proposition, which is, Has the Court of Claims jurisdiction to review the order of the head of an Executive Department of the Government in discharging a clerk whose rating is found to be inefficient? In other words, has the Court of Claims or any other court the power to institute an inquiry as to whether the judgment of the

head of an Executive Department, in passing upon the competency of a clerk, is founded upon sufficient reasons, and if not so founded in the opinion of the court, then to reverse such judgment and order the clerk to be reinstated, or, as is demanded in this case, to compel the Government to pay the salary, although no duties have been performed by the claimant?

The power of appointment to positions like the one held by appellant being vested by law in the head of the executive department in which he was serving, the right of removal necessarily follows (*Ex parte Hennen*, 13 Pet., 230; *Parson* v. *United States*, 167 U. S., 324), and the retention or removal of a person from such a position is vested entirely in the judgment and discretion of the head of the department, and this judgment and discretion, when exercised, can not be reviewed by the courts. To hold otherwise would simply lead to interminable confusion, would destroy discipline in the subordinate service in the executive departments, and would take away the power of the head of the department, who is responsible for its work, to pass upon the competency of those upon whom he must rely for the orderly and efficient conduct of its business. If a court has the power to institute an investigation to test the qualifications of a clerk who has been dismissed from an Executive Department, it would follow that the same court should inquire into the qualifications of the clerks who are retained or who have been appointed to fill vacancies. This would be necessary in order that the court might determine relative merit, for it will not do to say that the dismissed clerk possessed equal qualifications with

the clerk retained or appointed, unless the qualifications of the latter are ascertained by the same tribunal which passes upon the efficiency of the dismissed clerk. No intelligent or just decision could be arrived at upon such a question until the court was in possession of facts relating to both those dismissed and those retained or appointed. We can readily see what such a power vested in the courts would lead to. Every reduction or dismissal of a clerk in an Executive Department would be subject to judicial supervision, with the power on the part of the courts to reverse the action of the head of an Executive Department and to promote or reinstate clerks in such Departments without regard to judgment of the head of the Department.

The cases given above in support of the position that the power of removal is necessarily incident to the power of appointment are those cited by the Court of Claims in the opinion in this case, which will be found in the record, pages 7, 8, 9, and 10. There are numerous decisions and authorities touching upon the question of the right of the courts to interfere with an executive officer in the exercise of his discretion and judgment in making removals from office. When the civil-service act was under discussion in the Senate of the United States, Mr. Pendleton, who introduced it, said (Congressional Record, vol. 13, p. 81):

> The framers of the bill provoke no conflict with the constitutional power of removal from office. They avoid the delicate and difficult question of the duration of official terms. * * * They wisely thought that if every future vacancy should be filled

> by the appointment of the one man, in fact, the best fitted to discharge the duties, all other questions would soon settle themselves; that if no amount of pressure or patronage, however great, could avail to put a favorite into a vacancy, little wrongful pressure or patronage would be used to make a vacancy.

Again, he says, page 82, in the same volume of the Record:

> I have sufficiently indicated the constitutional difficulty which may arise and the wisdom of avoiding it. * * * Removals are rarely asked for under the spoils system except to make a vacancy for a particular man. If another man is to be put in, especially if the other man be the favorite of nobody, be recommended by nobody, be the partisan servitor of no person and no party, if he be simply the most capable and fit man for the place, demands for removal will be made only for cause, and then the demand should be heeded. Under the merit system of appointment the question of removal will be solved without legislation.

And again, on the same page, Mr. Pendleton says:

> Many very ardent friends of civil-service reform are opposed to what they call the establishment of an official class among the people. They advocate a fixed term for all officers. * * * For the present, without expressing any opinion or committing its supporters in any degree, this bill leaves the subject untouched.

And Mr. Justice Bradley, of the supreme court of the District of Columbia, in the case of *Gaddis* v. *Carlisle*, follows in the same line and says:

> Although, apparently, it has become a difficult thing to get into the civil service, yet it is just as

easy to get out as it was before the enactment of the law.

And further on he says:

> Whatever may be my opinion as to the competency of the relator to fill the position that he occupied, or my opinion as to the insufficiency and inadequacy and impropriety and lack of public policy of the reasons that were given for his removal, it is perfectly clear to me that this court is without authority to interfere in this case. (Congressional Record, vol. 26, p. 6224.)

The Secretary of the Interior in discharging the appellant on the ground that his rating was inefficient, was exercising a judgment and discretion vested in him over which the courts have no control and no authority to review.

In the case of the *United States ex rel. Boynton* v. *Blaine* (139 U. S., 306–326), Mr. Chief Justice Fuller, delivering the opinion of the court, says:

> The writ of mandamus can not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion.

See also—

*United States* v. *Windom*, 137 U. S., 636.
*United States* v. *Seaman*, 17 How., 225.
*Woods* v. *Gary*, 25 Washington Law Rep., 591.
*Carr* v. *Gordon*, 82 Fed. Rep., 373.
*Couper* v. *Smyth*, 84 Fed. Rep., 757.
*Morgan* v. *Nunn*, 84 Fed. Rep., 551.
*Flemming* v. *Stahl*, 83 Fed. Rep., 940.
*Dudley* v. *James*, 83 Fed. Rep., 345.

"Congress has left in the heads of departments all the discretionary power that was vested in them prior to the passage of the civil-service law and the promulgation of the rules relative to removals." (*Pulaski* v. *Lyman*, 21 Washington Law Rep., 403.)

In the case of *Page et al.* v. *Moffett* (85 Fed. Rep., 38), Kirkpatrick, district judge, says:

> The power of removal, which, by the act vested in the appointing power, subject though it be to certain limitations, can not be reviewed by an appeal to the courts. The result would be a breaking down of all discipline in every administrative department of the Government.

I could cite many other authorities, all to the same effect, but reference to most of them will be found in some one of the cases to which I have called the court's attention. I desire, however, to direct the court particularly to the opinion of the Court of Claims dismissing the petition in this case, for it is a learned and impressive presentation of the questions involved.

In conclusion, therefore, my contention is that the action taken in discharging the appellant as a clerk in the Interior Department was not a ministerial act, but was the exercise of a power vested by law in the judgment and discretion of the Secretary, and when the action was taken it was final, and the courts have no right to interfere.

JAS. E. BOYD,
*Assistant Attorney-General.*

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